

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 September 2019

Public Authority: Bank of England
Address: Threadneedle Street
London
EC2R 8AH

Decision (including any steps ordered)

1. The complainant requested a breakdown of the number of staff dismissed by the public authority and a breakdown of the reasons for the dismissals covering a 3 year period. The public authority withheld the requested information relying on the exemption at section 40(2) FOIA.
2. The Commissioner's decision is that the public authority was entitled to rely on the exemption at section 40(2) FOIA.
3. No steps required.

Request and response

4. The complainant submitted a request for information to the public authority on 15 February 2019 in the following terms:

“Please disclose the number of staff dismissed in each of the following calendar years: 2016, 2017 and 2018.

Please provide a breakdown showing the reasons for the dismissals.”

5. The public authority responded on 15 March 2019. It stated that 20 employees had been dismissed in the whole period 2016 to 2018 and explained that there were less than 10 cases in each year. By way of assistance, it also referred the complainant to the public authority’s staff handbook¹ which provides examples of the circumstances that can lead to an employee’s dismissal.
6. The public authority however withheld the more granular annual breakdown and any information about the specific reasons for dismissal relying on section 40(2) FOIA.
7. The complainant requested an internal review on 15 March 2019 disputing the decision to rely on section 40(2) FOIA.
8. The public authority wrote back to the complainant on 11 April 2019 with details of the outcome of the internal review. The review upheld the decision to rely on section 40(2) FOIA.

Scope of the case

9. The complainant contacted the Commissioner on 11 April 2019 to complain about the way that the public authority had handled his request specifically disputing the decision to rely on section 40(2) FOIA.
10. The scope of the Commissioner’s investigation therefore was to determine whether the public authority was entitled to rely on section 40(2) FOIA.

¹ Published online: <https://www.bankofengland.co.uk/-/media/boe/files/about/human-resources/staff-handbook.pdf>

11. The Commissioner has considered both the complainant's and the public authority's submissions further to her investigation of this matter. However, although the Commissioner has not referred to all of the public authority's submissions in this notice, she has fully considered the submissions from both parties before reaching her decision.

Reasons for decision

Withheld information

12. The withheld information provided by the public authority comprises of an annual breakdown of the number of staff dismissals from 2016 to 2018 and a summary of the reasons for the dismissals.

Section 40(2) FOIA

13. Section 40(2) FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the applicant and where one of the conditions listed in section 40(3A),(3B) or 40(4A) is satisfied.²
14. In this case the relevant condition is contained in section 40(3A)(a). This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data (the DP principles) as set out in Article 5 of the General Data Protection Regulation ('GDPR').
15. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 (DPA).
16. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the withheld information personal data?

17. Section 3(2) DPA defines personal data as:
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² For a full text of section 40 FOIA, visit:
<http://www.legislation.gov.uk/ukpga/2000/36/section/40>

"Any information relating to an identified or identifiable living individual."³

18. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
19. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
20. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
21. The complainant does not appear to dispute, not with any serious conviction in any case, that the withheld information constitutes personal data.
22. The public authority's submissions in support of the view that the withheld information constitutes personal data are summarised below.
23. As far as the public authority is aware all of the relevant individuals (the data subjects) are still living. Information such as the fact that they have been dismissed from the public authority and the specific reason for the dismissal is clearly "information relating" to each individual. It is accepted that the withheld information does not directly identify individuals. However, simply because the names of the individuals are not being disclosed does not mean they cannot be identified indirectly from the other information that may be available.
24. The withheld information is relatively recent, involves a small number of individuals and relates to a high profile public institution. Therefore, there is a genuine risk that a motivated member of the general public and/or current or former employees of the public authority could, by combining the withheld information with other information known or available to them from other sources, be able to identify one or more of the data subjects.
25. Current or former members of the public authority could identify some or all of the data subjects were the withheld information to be disclosed.

³ <http://www.legislation.gov.uk/ukpga/2018/12/section/3>

This is particularly so given the low number of data subjects and that the withheld information is relatively recent making facts relating to particular cases more likely to still be remembered.

26. While the public authority employs approximately 4500 staff, those staff work in different teams some which are small in number and cross cutting (ie an employee based in one team is also likely to work with colleagues based in different areas of the public authority). As a result, an employee working in a small team may be able to identify another individual by piecing together the withheld information with other information already within their knowledge as a consequence of their employment at the public authority or from other sources.
27. With respect to the two cases the complainant has referred to which he argues are “examples of public bodies disclosing information about staff dismissals”, the public authority noted the need for careful judgement based on the circumstances of each case and, the fact that a decision reached by one public authority is not necessarily a precedent to be followed by another although it may of course be informative. The public authority has no information on how each public authority in the two cases reached the position it did or whether, and if so how, the Information Commissioner’s published guidance in this area was considered and applied.
28. The Commissioner is satisfied that the withheld information is personal data given that it relates to identifiable individuals – ie the data subjects. The Commissioner accepts that the withheld information could be combined with other information by a motivated member of the public such as current or former employees of the public authority to identify the data subjects.
29. The Commissioner cannot comment on the disclosures made by the public authorities in the two cases referred to by the complainant further to a broader request in relation to the number and nature of disciplinary actions taken by those authorities. She is satisfied that the withheld information in this case constitutes personal data within the meaning of section 3(2) DPA.
30. However, the fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
31. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

32. Article 5(1)(a) GDPR states that:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject.”

33. In the case of a freedom of information request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
34. In order to be lawful, one of the lawful bases listed in Article 6(1) GDPR must apply to the processing. It must also be generally lawful.
35. The Commissioner considers that the lawful basis most applicable is Article 6(1)(f).
36. In considering the application of Article 6(1)(f) in the context of a request for information under FOIA it is necessary to consider the following three-part test:
 - i. **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - ii. **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii. **Balancing test:** Whether the above interests override the interests, fundamental rights and freedoms of the data subject.
37. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

38. In considering any legitimate interest(s) in the disclosure of the withheld information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
39. The complainant considers that there is a compelling and significant public interest in disclosure of information about wrongdoing at the Bank of England. He considers that disclosing the withheld information is necessary to meet the compelling public interest in disclosure.

40. The public authority accepts that there is a general public interest in the public authority being seen to be accountable and transparent generally and that there may also be a specific public interest in "wrongdoing" at the public authority. However, the public authority considers that it has satisfied the general public interest by providing the complainant with both information on the total number of staff dismissals during the period in question, confirming the number of dismissals in each year is less than 10 and, publishing its staff handbook online which provides detailed information on staff policies and procedures including the grounds for dismissal from the public authority.
41. The public authority considers that the more specific information requested by the complainant is in fact unlikely to enhance significantly the public's understanding of any "wrongdoing" at the public authority. That is because, not every dismissal would amount to "wrongdoing." Dismissals could be for a variety of reasons including poor performance and attendance issues which would not necessarily amount to "wrongdoing." In addition, not all types of "wrongdoing" will necessarily automatically result in dismissal from the public authority. As can be seen from the published staff handbook, the public authority operates a formal disciplinary process and a written warning may, for example, be deemed appropriate in a misconduct case reflecting the particular circumstances.

Is disclosure necessary?

42. The Commissioner considers that 'necessary' in this context means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
43. The public authority considers that the disclosure of the withheld information would not, in and of itself satisfy the specific legitimate interest that the complainant has identified. However, even if that view is not accepted and the number of misconduct related dismissals is seen as some kind of indicator of the level of "wrongdoing" at the public authority, it should be noted that the total number of 20 dismissals for period requested is in fact very low relative to the public authority's headcount of approximately 4500 during that period. From this a reasonable conclusion could be drawn that even if all of those dismissals had been for misconduct reasons, "wrongdoing" at the public authority is not of a scale that would justify further interference with individuals' privacy rights and the information already provided has therefore satisfied the identified legitimate interest. Consequently, the

complainant has not established a “pressing social need” for the interference with privacy rights or demonstrated that such interference would be “proportionate” in the circumstances to justify any additional disclosure.⁴

44. In the Commissioner’s view, disclosure of the withheld information is not necessary to meet the interests identified above. She accepts that there is a legitimate interest in disclosing information about wrongdoing at the public authority. However, the Commissioner considers that in the circumstances of this case, disclosure of the withheld information is unlikely to satisfy that specific legitimate interest and is therefore not necessary. She accepts that in the circumstances of this case there is no pressing social need to disclose the withheld information.
45. The Commissioner considers that the information released by the public authority in response to the request is sufficient to meet the more general legitimate interest in transparency without disproportionately interfering with the privacy rights of the data subjects.
46. As the Commissioner has decided in this case that disclosure of the withheld information is not necessary to meet the legitimate interest in disclosure, she has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).
47. Consequently, the Commissioner has concluded that the public authority was entitled to rely on the exemption at section 40(2) FOIA.

⁴ In line with the view taken by the High Court in *Corporate Officer of the House of Commons v Information Commissioner and Brooke, Leapman and Ungeod-Thomas [2008] EWHC 1084 (Admin)*, that there must be a pressing social need for any interference with privacy rights and that the interference must be proportionate.

Right of appeal

48. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

49. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
50. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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